No. 2479

United States
Circuit Court of Appeals
For the Ninth Circuit

J. PAUL THOMPSON,

Appellant,

vs.

EMMETT IRRIGATION DISTRICT and W. H. SHANE, N. B. BARNES and E. J. REYNOLDS, as Directors, and R. B. SHAW, as Treasurer, of Emmett Irrigation District,

Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

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FREMONT WOOD,
DEAN DRISCOLL,
Residence, Boise, Idaho.
Solicitors For Appellees.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

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STATEMENT.

The appellant's statement as to the facts of this controversy is substantially correct. Some statements are made in the brief, as to matters entirely outside the record in the case, as for instance the opening sentence of the argument, on page eleven of the brief, to the effect that it is conceded that appellant is entitled to relief, and the statement at the bottom of page 27, to the effect that default has been made on coupons maturing subsequently to the filing of the bill herein and no interest levied; as to which we do not wish to be held to have conceded the facts, nor that any such matter is before the court at this time. From appellees' standpoint the statement should also be supplemented by calling atten-

tion, more emphatically than has been done, to the fact that, stripped of all surplusage, the bill in this action states merely a cause of action for recovery of a money judgment on interest coupons of the Irrigation District bonds, or, in other words, the bill sets up a state of facts which, if true, would be remedied by a law court, by compelling the directors of the irrigation district to perform their statutory duty of levying, collecting and paying over the proper assessment for the interest coupons.

Inserted in the bill, however, with this cause of action, on the coupons alone, are a large number of the most general allegations, many of them mere conclusions of the pleader and most of them made only upon information and belief, to the effect that default on coupons not yet due will be made in the future; that many suits will be required by the bondholders as the coupons mature; that the directors by their action, conduct and statements are encouraging the repudiation of the bonds and coupons and the instigation of suits attacking them; further, that the defendants allege that one-fifth of the bonds are issued without consideration and will not be paid until compelled by a judgment. (Par's. 16-17-18 of bill, pp. 16 to 19 of Trans., and Par. 19 of the amended bill, pp. 23-26 inc. of Transcript). On these allegations, most of which concern not the coupons now due but the bonds themselves, which are not due and on which no recovery is asked, the court below was asked to take jurisdiction on the equity side, and this in the face of the fact that it affirma-

tively appears on the face of the bill itself that every step required by law in the levy and collection of the taxes to pay the interest up to the date of filing of the bill had been taken by the directors. The court is asked, not only to compel the payment of the appellant's coupons now due but to enter a decree which in substance amounts to a decree quieting title to appellant's bonds. (Trans. pp. 20 and 21). Appellees here, defendants below, object to the jurisdiction of the court on the equity side, on the ground that the plaintiff has an adequate remedy at law. (See motion to dismiss, pp. 27 to 30 inc. Trans. and especially Par. 4 of said motion, p. 29). The contention was sustained below. (Decision pp. 31 to 39, Trans.)

ARGUMENT.

An irrigation district is a public, quasi municipal corporation, under the laws of Idaho, as well as under the Wright Act of California, from which the Irrigation District Law of Idaho was largely taken. Pioneer Irrigation District vs. Walker, 20 Ida., 605, 119 Pac, 305; Colburn vs. Wilson, et al., 23 Ida. 337, 130 Pac. 381; City of Nampa vs. Nampa and Meridian Irrigation District, 19 Ida., 779, 115 Pac. 979.

Our contention is that as to such corporations in cases like the present the remedy at law, namely, judgment followed by writ of mandamus is adequate and complete, and that, therefore, this court will not take jurisdiction in equity, in view of Section 723 of the Revised Statutes of the United States. That the remedy named exists is, of course, almost axiomatic

at this date, as it has been repeatedly used, both in cases where the directors or other municipal officers were asked merely to pay over funds previously collected and in cases where no fund had been provided and the relief asked was the enforcement of the levy, collection and payment over of the tax. Among the latter class of cases are the following:

Shepard vs. Tulare Irrigation District, 94 Fed. 1; affirmed 185 U. S. 1, 46 L. Ed., 773.

Thompson v. Perris Irrigation Dist. (C. C. S. D. Cal.) 116 Fed. 769; affirmed C. C. A. 9th Cir. 122 Fed. 860.

Mather v. City and County of San Francisco (C. C. A. 9th Cir) 115 Fed 37.

Herring v. Modesto, 95 Fed. 705.

The same rule obtains in those cases, where the fund has been raised and nothing remains but payment over. City of Santa Cruze vs. Wait, (C. C. A. 9th Cir.) 98 Fed. 387-393; S. C. below, 89 Fed. 619.

The question remains as to whether the remedy is of such a character as to bar the equitable jurisdiction. We think the authorities abundantly sustain our contention that it is. The following cases have held that a court of equity had no jurisdiction to compel the proper officers of a municipality to levy taxes for the satisfaction of a judgment previously had at law on bonds or interest coupons of the municipality, but that, on the contrary, the writ of mandate was the proper remedy.

Commissioners of Knox County v. Aspenwall, 24 Howard, 376, 16 L. Ed. 735.

Walkley v. City of Muscatine, 6 Wall, 481, 18 L. Ed. 930.

Rees vs. Watertown, 19 Wall, 107, 22 L. Ed. 72 (last two paragraphs).

Marra vs. San Jacinto & P. V. Irr. Dist., 131 Fed. 780, (Last Par. pp. 789-791).

Neither has the equity court jurisdiction to compel the levy or collection of the tax by the proper officers, where no judgment has been previously had at law.

Washington County v. Williams, (C. C. A. 8th Cir.) 111 Fed. 801, (at pp. 811-812).

Heine v. Board of Levee Comm., 19 Wall. 655, 22 L. Ed. 223.

In the last case cited the Supreme Court sustained a judgment dismissing a bill in equity, which alleged that the plaintiff was the holder of certain bonds issued by the defendant, Levee District, which, (like an irrigation district under our law) was a quasi municipal corporation, with authority to issue bonds and provide for their payment by tax levy on the property in the district; further that the commissioners had failed to make the levy and had resigned their offices for the purpose of avoiding the duty. The relief prayed was that the commissioners be required to make the levy. No attempt had been made to recover a judgment or to collect at law. The Supreme Court says:

"The question thus presented by the present case is not a new one in this court. It has been decided in numerous cases, founded on the refusal

to pay corporation bonds, that the appropriate proceeding was to sue at law and by a judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascertain that no property of the corporation could be found liable to such execution and sufficient to satisfy the judgment. Then, if the corporation had authority to levy and collect taxes for the payment of that debt, a mandamus would issue to compel them to raise by taxation the amount necessary to satisfy the debt."

And, again:

"There does not appear to be any authority founded on the recognized principles of a court of equity on which this bill can be sustained. If sustained at all it must be on the very broad ground that because the plaintiff finds himself unable to collect his debt by proceedings at law, it is the duty of a court of equity to devise some mode by which it can be done. It is, however, the experience of every day and of all men, that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune which, in the imperfection of human nature, often admits of no redress. The holder of a corporation bond must be common with other men, submit to this calamity, when the law affords no relief."

The same rule obtains where the levy and assess-

ment has been made and nothing remains but collecting and paying over. This was ruled in Goelet, et al., vs. Elizabeth, 10 Fed. Cases, 526, Case No. 5502, and Thompson vs. Allen County, 115 U. S. 550, 6 U. S. S. C. Rep., 140, 29 L. Ed. 472.

In the Goelet case the facts were very similar to the present case. A bill was exhibited on the equity side of the court against the City of Elizabeth and its officers, alleging that the plaintiff was the holder of a judgment on certain of the city's bonds; that the city was insolvent and its officers had been and were collecting and diverting its revenues to purposes other than the satisfaction of plaintiff's judgment; that execution had been issued and returned unsatisfied. The Court says, on page 527:

> "The difficulty with complainants' case, as it appears to us, is, that they have no standing in a court of equity. The 723d section of the Revised Statutes of the United States provides that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.' It may be true that the complainants have not 'a plain, adequate and complete remedy at law' for all that they ask for, but we think they have for all that they are entitled to. Conceding for the present that they are judgment creditors of an insolvent municipal corporation, and that they have failed to realize upon their execution the amount of their claim, yet their remedy at law is not exhausted. By a

long line of decisions of the supreme court, beginning with Knox v. Aspenwall, 24 How. (65 U. S.) 376, and ending with the recent case of U. S. v. New Orleans, 98 U. S. 381, it has been held that under the constitution and law of the United States, and especially by the provisions of the 14th section of the judiciary act (1 Stat. 81), the federal courts may issue the writ of mandamus to compel the proper authorities of municipal corporations to levy a tax for the payment of their debts, when no other means have been provided to meet their obligations."

The Thompson case was an appeal from a decree of a Circuit Court in Kentucky dismissing a bill in equity for want of jurisdiction. The showing was that the plaintiff had received judgment on bonds of the defendant county and execution had returned unsatisfied. The proper tax for payment had been compelled by a writ of mandamus, but no collector could be found to collect the taxes. After citing and reviewing many of the foregoing cases, the court say:

"We apprehend that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is no adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it

is adequate and its results satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that by means of the aid afforded by the legislature, and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate. The difficulty is in its execution only. The want of a remedy, and the inability to obtain the fruits of a remedy, are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facius possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York confederations of settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could obtain possession of the land. There was a perfect remedy at law, but through fraud, violence, or crime its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedy was temporarily suspended by means of an illegal violence, but the remedy remained as before. It was the case of a miniature revolution. The courts of law lost

no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is inadequate and complete, and time and the law must perfect its execution."

* * * * *

"A court of law possesses no power to levy taxes. Its power to compel officers who are lawfully appointed for that purpose, in a case where the duty to do so is clear, and is strictly ministerial, rests upon a ground very different from and much narrower than that under which a court of chancery would act in appointing its own officer either to assess or collect such a tax. In the one case the officers exist, the duty is plain, the plaintiff has a legal right to have these officers perform this duty for his benefit, and the remedy to compel this performance, namely, the writ of mandamus, has been a well known process in the lands of the courts of common law for ages."

* * * * *

"If the common law court can compel the *assessment* of a tax, it is quite as competent to enforce its *collection* as a court of chancery. Having jurisdiction to compel the assessment, there is no reason why it should stop short, if any further judicial power exists under the law, and turn the case over to a court of equity."

When the sole duty left for performance by the officers of the municipal corporation is the payment over of a fund already raised, the remedy at law is

the more clearly apparent and adequate. Such was the situation in Hausmeister v. Porter, 21 Fed. 355 (C. C. D. Cal.), a case thought to be directly in point in law and fact, and in which Sawyer, J. dismissed the bill for want of jurisdiction, on the ground urged by appellees here. The bill was brought by the holder of the bonds of Sacramento City, alleging that there was a large amount of money in the city treasury, that it was the duty of the treasurer to set aside a certain per cent thereof as a separate fund for the payment of his bonds and apply the same thereto; that the treasurer had refused so to do and was unlawfully diverting the money to other purposes. An injunction against using the money for any other purpose was asked, as in this case. After citing Section 723 Revised Statutes of the United States, the court says, on page 356:

> "In this case, if, as alleged, there are funds in the treasury applicable to the purpose, it appears to me that the complainant has a plain, adequate, and complete remedy at law, by mandamus, for the non-payment of any lawful coupons held by him now due. Also, a complete remedy at law, by mandamus, if any remedy he has at this time, to compel defendant to set apart any moneys in the treasury required by law to be set apart as a 'sinking fund' for the payment when they fall due of any bonds held by him not yet matured."
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> "From these cases it is clear that if there is money in the city treasury applicable to the pur-

pose,—and it is alleged that there is,—the treasurer can be readily compelled by mandamus to pay the amount due complainant on his coupons; and if the officers do not provide the funds by levying the proper tax, that they can be compelled to do so by mandamus. This is a remedy at law direct, speedy and adequate, and, as was stated in the last case cited, the only remedy, in view of the provisions of the statute under which the bonds were issued and accepted. The decree asked for in this bill would afford no relief whatever without other and independent proceedings at law. It would simply keep the money in the treasury. No decree for the payment of the money could be made, because a judgment against the city, at law, would be ample for that purpose where a judgment could be had, and no such decree is asked."

II.

Unless, then, there is something in the case made in the bill to distinguish it from the ordinary action for the enforcement of the statutory duty incumbent upon the municipal officers, as to the levy, collection and payment over of the tax for the satisfaction of the interest coupons, it would seem that the question of jurisdiction was not even open to argument. Appellant attempts such distinction, and, as we understand his brief, purports to find three grounds upon which the equitable jurisdiction may be based:

1st. That the district stands in the relation of a

trustee toward the bondholders and that equity will take cognizance in all matters involving a trust.

2nd. The familiar ground of avoidance of multiplicity of suits; and

3rd. That equity will take jurisdiction to quiet title to, or remove cloud from title of personal property as well as real, and that as a holder of the bonds he is entitled to such relief on the case made in the bill.

From this he goes on to the conclusion that the equity court, having jurisdiction for one purpose, will retain it for all purposes, thus drawing the whole of the controversy to the equity side of the court. To our minds the propositions, as well as the deduction, are unsound as applied to the facts of this case. But it seems unnecessary to go further than to show that on the case made by the bill, none of the alleged grounds of jurisdiction exist. We, therefore, take them up in the order named, proceeding first to the question of the existence, and, if existent, the effect of the district's trusteeship. Our contention is that neither the district or the board are trustees for the bondholders; and, further, that, if the existence of such trusteeship was admitted, this case would not be brought within equitable cognizance thereby.

As to the first proposition, namely, that the appellees are statutory trustees for the bondholders, appellant collects, on page nine of his brief, a number of authorities which it is claimed sustain that proposition. This we think is unfounded.

The statutes of Idaho, with reference to the payment of the bonds and interest, are printed in full on pages 37, 38 and 39 of appellant's brief. It will be noticed by the provisions of Section 2405, that the bonds and interest are to be paid by revenue derived from an annual assessment on *all* the lands of district. And by the provisions of Section 2410, the directors are required to levy an assessment annually, sufficient to raise the annual interest, and at the expiration of ten years after the issuance of the bonds, to increase the annual assessment to raise a sum sufficient to pay the principal as it matures. Further, that the assessment shall be paid into the treasury and constitute a special fund to be called the bond fund. It is in no place expressly provided that money can not be transferred from the bond fund into other funds, if the board thinks it advisable; nor that the bonds do not constitute a *general* obligation of the district. Direction is given as to providing a special fund for payment of bonds and interest but payment is not limited to that fund. True, no other means is provided therefor, but that we submit is purely a matter of the method of raising funds as between the district and the land holders and does not vary the character of the obligation as between the bond holders and the district. In short, as between the latter, the bonds are general obligations, and the fact that no means was provided for payment other than the special assessment would not vary their character as such. (United States v. Fort Scott, 99 U. S., 152; Fort Madison v. Fort

Madison Water Co., 114 Fed. 292). Being the general obligations of the district, the relation of debtor and creditor exists, rather than that of trustee and beneficiary. This point alone clearly distinguishes the cases hereinbefore referred to as cited by appellant on this point. With possibly one exception, every one of them involved special improvement bonds, that is bonds issued by a city or municipal corporation in payment for, or to raise money for, improvements in special and limited localities, within the boundaries of the municipality and to be paid by special assessment levied on the property benefited. As is expressly stated in the opinions, the bonds were so limited by the statutes or ordinances under which they were issued that they did not constitute a general, or any, pecuniary obligation of the municipality which was obligated only to take the steps provided to raise the fund for payment.

But even in the cases of the character cited by appellant, the trust, if any exists, is certainly not express. At most it was merely an implied trust, possibly only constructive. We do not, of course, dispute appellant's proposition, that equity has jurisdiction of trusts, and that such jurisdiction *may* be exercised even in a case where the legal remedy is adequate; in short, where the jurisdiction is concurrent. But we do contend that it is quite another thing to say that equity will imply a trust or impress a constructive trust for the purpose of taking jurisdiction where the jurisdiction is concurrent. Assuming, for the purpose of argument only, that, on the

facts shown a trust exists, and laying aside the question of multiplicity of suits, and the other matters shown in the bill, on which it is contended that the remedy at law is inadequate, all of which are discussed hereafter, certainly it will have to be admitted that the appellant has a concurrent remedy at law, by judgment and mandamus. In such case, we contend that, although the equitable jurisdiction *exists*, it will not be exercised, and this is especially true in the federal courts. Stated differently, where the existence of a concurrent jurisdiction is recognized, whether it will be exercised or declined rests largely in the discretion of the court, conditions as to the adequacy of the legal remedy controlling the exercise of such discretion. This is well illustrated in Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed., 501, cited by appellant, was an appeal from a judgment dismissing a bill in equity, on the ground that the remedy at law was complete and adequate. It was contended that the court had jurisdiction to compel an agreement to be delivered up to be cancelled, as it had been obtained through false and fraudulent misrepresentations. The court says that fraudulent misrepresentations and the fraudulent suppression of material facts are the principal grounds for the relief prayed, and was of the opinion that the facts were established. The jurisdiction of equity, is, of course, as well established in cases of this kind as in matters involving trusts, but the dismissal was nevertheless sustained, the court saying:

"Courts of equity, unquestionably, have jurisdiction of fraud, misrepresentation and fraudulent suppression of material facts in matters of contract, but where the cause of action is 'a purely legal demand,' and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a Federal Court, as it is clear that the case, under such circumstances is controlled by the 16th section of the Judiciary Act."

The fundamental error, in our opinion, in appellant's brief on this point is the failure to distinguish between the existence of jurisdiction and the question of discretion as to exercise thereof. If it should be found that features of such character exist in this case that the equity court has jurisdiction, we still say that, nevertheless, the court, as a matter of discretion, will decline to exercise it, for the remedy at law is adequate. As was said by the court below (p. 38 Trans.), the court will not, "in advance of any general need therefor, draw to itself the whole of a controversy, the principal if not the only substantive issue in which may without difficulty or delay be tried out in an action at law, that would be to treat too lightly the fundamental right of a jury trial."

A similar rule is stated by Wallace J., in White v. Boyce, (CC. N. Y.), 21 Fed. 228-232:

"While courts of equity have concurrent jurisdiction in all cases of fraud, they will not ordinarily exercise it, if there is a full and adequate

remedy at law (Bish. Eqt. Par. 20), Ambler v. Choteau, 107 U. S. 586; S. C. 1 Sup. Ct. Rep. 556), and the federal courts are especially admonished not to entertain such cases. The statutory enactment (section 16 of the Judiciary Act, Rev. Stat. par. 723), if only declaratory of the pre-existing law, is at least intended to emphasize the rule and impress it upon the attention of the court. New York Co. v. Memphis Water Co., 107 U. S. 205; S. C. 2 Sup. Ct. Rep. 279. It is the duty of the court to enforce this rule *sua sponte*. Oelrichs v. Spain, 15 Wall. 211; Sullivan v. Portland R. Co., 94 U. S. 806. It would therefore not be proper to assume to determine the question of fact whether any misrepresentations were made to complainant by defendant.

"Jurisdiction properly assumed, upon one aspect of the controversy, would authorize the court to proceed to a decree which would do full justice in the case upon all its branches. But unfounded claims of a character cognizable in equity cannot be made the basis of relief respecting other controversies between the parties which are cognizable only at common law."

The cases cited by appellant to this point are distinguishable along the same line. In every one of them it was held that there was no adequate remedy at law, owing to the peculiar facts set forth or the peculiar law of the state where they arose. The court then proceeded to exercise jurisdiction on the ground of trusteeship. No one of them is authority for the

proposition that jurisdiction would have been exercised, even though a trust existed, had there been a remedy at law.

In conclusion on this point, it should be noticed, concerning the cases cited by appellant, that, with the exception of two, all of them are from the same district (Iowa) and that the other two (from Wisconsin) are founded on the Iowa cases, and, if in point at all, are contrary to the rule laid down by the Supreme Court of the United States as illustrated in cases hereinbefore cited. Furthermore, in all of them past diversions of funds were alleged and an accounting asked and shown to be necessary. In this case no past diversion is alleged, or is any adequate allegation made that there is danger of any diversion in the future.

III.

As to the argument that equity will take jurisdiction to prevent multiplicity of suits, there are several replies, the most obvious of which is that such jurisdiction will not be taken if there is no showing in the bill that such multiplicity of suits will be prevented, or, differently stated, unless there is an affirmative showing in the bill that the action of the equity court will be more efficacious in limiting the number of suits than would a judgment of the law court. There is an utter lack of any such showing in this bill.

As will be observed, there seems to be three classes of suits of which the appellant is apprehensive,

namely, tax-payers suits against the district, suits on similar bonds by other bond holders, and future suits on subsequently maturing coupons held by him. As to the first two classes, certainly a law action will be as effective as any disposition of the matter in equity. Those who would be parties to such suits are not parties to this suit, and can therefore be affected by no decree that could be made herein. A decree herein will be of avail in such suits only so far as the same operates as a precedent, which is equally true of a judgment in a law action.

Furthermore, as is said by the Supreme Court in Equitable Life Assurance Society v. Brown, 213 U. S. 25, 53 L. Ed. 682:

> "It does not rest with the complainant to urge as a foundation for his suit, that the defendant may be thereby saved a multiplicity of suits by other parties, where the defendant raises no objection to such possible suits and urges no grounds for jurisdiction in equity of the complainant's suit."

See also Thomas v. Council Bluffs Canning Co. (C. C. A. 8th Cir.) 92 Fed. 422-423:

> "The multiplicity of suits which confers jurisdiction in equity is a multiplicity of suits to which the complainant will be a party."

As to the third class of suits, namely, those to be brought by complainant in the future, we submit there is no allegation in the bill upon which the conclusion that such suits are imminent can be reason-

ably founded, much less anything upon which it could be concluded that equity could afford any relief in this action which would in anywise limit their number. The only showing in this connection is made in the part of the complaint appearing on pages 17, 18, 19 and 25 of the Transcript. On page 17 it is alleged, *on information and belief*, that default will be made in subsequently maturing coupons. No fact is alleged upon which the court may judge as to whether or not the plaintiff is correct and no threat alleged. On page 19, the complaint says that unless restrained, he believes, defendant will institute and encourage actions attacking the bonds. On page 25 he says numerous suits will be instituted. We submit the allegations are insufficient, and, as is said by the court below, on page 36, "The probability of a multiplicity of suits is also asserted, but such danger does not appear to be imminent. There is no reason for concluding that, if in an action at law upon the coupons the court holds that the plaintiff is the rightful owner of the bonds, the district will in the future decline to meet its payments as and when they fall due."

Something is said in the brief as to the apportionment of the fund, but it is certainly apparent that no apportionment can be had in the absence of other bondholders as parties.

IV.

There remains the argument that equity will take jurisdiction to remove a cloud from the title to per-

sonal property, i. e., appellant's bonds. It is to be noticed that the first of the bonds do not mature until eleven years from the date of their issuance. Sec. 2397, I. R. C. (p. 37 Appellant's brief), that they were not authorized until December 6, 1910 (p. 4 Trans.), and hence the first of them cannot mature before December, 1921. Further, that no action is required by law of the board of directors or the district concerning the bonds until the expiration of ten years after their issuance thereof, at which time the directors must levy a sufficient sum to pay the principal as it matures. Sec. 2410, Idaho Revised Codes (p. 39 App. brief). This, at the earliest, would be in December, 1920.

The bonds are, of course, an entirely different and distinct matter from the matured coupons, upon which this action is primarily based, and the bill affirmatively shows that every act required of the board to date, in connection with both bonds and coupons, save and except the actual payment over of the money on the matured coupons, has been performed. The relief asked in this connection is that the defendants be restrained from doing anything which will in any way depreciate the value of the bonds, and that it be adjudged and decreed that all the bonds are legal and valid obligations of the district, and that they must be paid according to their tenor (pp. 20-21 Trans.). The allegations upon which this relief is asked, as heretofore noticed, are almost entirely made on information or belief and consist largely of appellant's conclusions. No threat, or any

other fact is alleged, on which the court might draw its own conclusions as to the necessity of such relief, and, as was said by the court below (Trans. p. 37), no reason is shown upon which it could be presumed that the judgment at law would not be "quite as effective in quieting such agitation and establishing the value of the bonds as a decree of a court of equity."

As authority for this proposition, appellant cites cases from the state courts, of which the case of Sherman v. Fitch, 98 Mass. 59, is a fair example. As clearly appears, even in that portion of the opinion quoted on page 29 of the brief, the suit was one for the *cancellation of outstanding instruments* which constituted a cloud on the title of the personal property. The other cases cited are similar. Needless to say no such proposition is involved here. If there is anything in the bill even resembling a cloud, it is the alleged statements of the defendants concerning the bonds, which oral statements, as this court well knows are not such matters as will be recognized in equity as a cloud on title.

Nor, on the other hand, have we been able to find any case wherein the validity of a contract as between the parties thereto has been established, far in advance of a breach, under the guise of removing cloud from title to personal property more especially where the contract is nothing more or less than the contract for the payment of money, as to which equity has always refused to decree specific perform-

ance, even when a breach was actually at hand or previously committed.

Respectfully submitted,

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